IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PATRICK A. DERYKE, Appellant.	)	No. 56039-5-I **DIVISION ONE** UNPUBLISHED OPINION FILED: July 10, 2006

APPELWICK, C.J. — This is the second appeal in this case. A panel of this court, on a prior appeal, decided that the defendant's two convictions merge. After the Supreme Court affirmed the conviction reviewing other issues, the case was remanded for resentencing. DeRyke argues that the trial court did not follow this court's opinion at resentencing. DeRyke also raises additional arguments for the first time on this second appeal. We reverse and remand for resentencing consistent with this court's prior opinion. We affirm on all other grounds.

FACTS

A jury convicted Patrick DeRyke of attempted rape in the first degree and

kidnapping in the first degree. The jury also found that DeRyke was armed with a firearm in the commission of each offense. Additional facts of the underlying offenses can be found in the first opinion on this case. State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002), aff'd on other grounds, 149 Wn.2d 906 (2003) (hereinafter DeRyke I). The trial court sentenced DeRyke with firearm enhancements for each conviction and ordered his sentences to run consecutively. DeRyke I, 110 Wn. App. at 818. On a direct appeal, this court found that DeRyke's two convictions merged. DeRyke I, 110 Wn. App. at 817. On remand, the trial court resentenced DeRyke to 120 months (the statutory maximum) on the attempted rape conviction and 156 months on the kidnapping conviction including firearm enhancements, to run concurrently. DeRyke appeals.

ANALYSIS

I. The Trial Court Erred At Resentencing

On his first appeal, DeRyke argued that his kidnapping conviction should have been merged into his rape conviction.[1] DeRyke I, 110 Wn. App. at 822. The court reviewed the doctrine of merger in Washington courts: "Under

[1] DeRyke made several additional arguments in his first appeal. He argued that the trial court exceeded the statutory maximum sentence on the attempted rape conviction. This court agreed. DeRyke I, 110 Wn. App. at 822. He also argued that the attempted rape and kidnapping convictions constituted the same criminal conduct. DeRyke I, 110 Wn. App. at 817. This court did not decide this question because it was rendered moot by the court's decision on merger. DeRyke I, 110 Wn. App. at 824. DeRyke also argued that the to-convict jury instruction on the attempted rape count deprived him of due process. DeRyke I, 110 Wn. App. at 817. This court rejected this argument, but the Supreme Court disagreed and held that the to-convict instruction was improper. The Supreme Court held, however, that the error was harmless and DeRyke was not entitled to reversal. DeRyke I, 149 Wn.2d at 912. The Supreme Court thus affirmed DeRyke's attempted rape conviction. DeRyke I, 149 Wn.2d at 914.

Washington's criminal code, use of a deadly weapon and kidnapping the victim serve as independent bases on which to elevate a rape charge to rape in the first

degree." DeRyke I, 110 Wn. App. at 823 (citing RCW 9A.44.040(1)(a), (b)). "[W]hen a defendant is convicted under the kidnapping provision of the first degree rape statute, the merger doctrine applies to the kidnapping offense 'because it is one of the crimes accompanying the act of rape that elevate[s] it to a first degree felony.'" DeRyke I, 110 Wn. App. at 823 (quoting State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996)) (emphasis added).

The jury instruction here instructed the jury that

> A person commits the crime of rape in the first degree when that person engages in sexual intercourse with another person by forcible compulsion where the perpetrator uses or threatens to use a deadly weapon or what appears to be a deadly weapon or *kidnaps the victim*.

DeRyke I, 110 Wn. App. at 823. The court held that there was no way to determine whether the jury relied upon DeRyke being armed with a deadly weapon or DeRyke kidnapping the victim as the basis to convict him of attempted first-degree rape. DeRyke I, 110 Wn. App. at 824. Thus, the Deryke I court held that principles of lenity required it to interpret the ambiguous verdict in favor of DeRyke:

> We must therefore assume the jury based its verdict on DeRyke's kidnapping of C.L. rather than on his use of a deadly weapon. Because the attempted rape charge was elevated to a higher degree based on his kidnapping the victim, a separate crime defined in RCW 9A.40.020, the trial court erred by failing to merge DeRyke's kidnapping offense into his attempted first degree rape offense.

DeRyke I, 110 Wn. App. at 824 (footnotes omitted).

The DeRyke I court did indicate which offense should merge into the

other. The DeRyke I court clearly stated that the trial court erred by failing to merge DeRyke's kidnapping offense into his attempted rape offense. DeRyke I, 110 Wn. App. at 824. The DeRyke I court's use of other language elsewhere in the opinion is not inconsistent with this statement.[2] This issue was not taken on review by the Washington Supreme Court in DeRyke I.[3] The law of the case doctrine precludes the State from re-arguing the merger issue because there is a prior opinion in this case on that issue. See State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). Once the principles of the merger doctrine are applied here as decided in DeRyke I, only DeRyke's attempted rape conviction survives.[4]

The only issue properly before us is whether the trial court correctly resentenced DeRyke based on this court's opinion in DeRyke I. The trial court erred in failing to vacate DeRyke's kidnapping conviction. We vacate DeRyke's conviction and sentence on the kidnapping charge. We affirm DeRyke's sentence on the rape conviction. However, the judgment and sentence contains

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[2] The DeRyke I court also stated "on remand the trial court should merge DeRyke's conviction for first degree kidnapping with his conviction for first degree rape" and the "case is remanded to the trial court to merge the attempted rape and kidnapping convictions." DeRyke I, 110 Wn. App at 817, 824.

[3] The Washington Supreme Court addressed a separate due process claim. On the merger issue, the Washington Supreme Court only noted: "The Court of Appeals reversed DeRyke's conviction for first degree kidnapping on the ground it should merge with his conviction for first degree rape, and it remanded for resentencing because DeRyke's sentence for attempted first degree rape exceeded the statutory maximum." DeRyke I, 149 Wn.2d at 909-10.

[4] After oral argument, the State cited as supplemental authority this court's decision in State v. Weber, 127 Wn. App. 879, 112 P.3d 1287 (2005), review granted, 156 Wn.2d 1010 (2006). The Weber court held that "to remedy a double jeopardy violation presented when two convictions punish the same offense, the court must vacate the crime carrying the lesser sentence." Weber, 127 Wn. App. at 888 ¶ 21. However, after the DeRyke I opinion determined that the kidnapping conviction merged into the attempted rape conviction, only one conviction survived. No double jeopardy violation remains to be analyzed under Weber.

a notation that the 36 month community custody period on the rape is reduced to 24 months because of merger. We remand to the trial court to impose the correct community custody period in the judgment and sentence. DeRyke should be subject to the community custody period for the rape conviction because his kidnapping conviction is vacated.

II. Issues Not Raised In First Appeal

DeRyke raises two additional issues on this appeal. DeRyke argues that the sentencing court exceeded its statutory authority in imposing firearm enhancements. DeRyke also argues in a Statement of Additional Grounds that he was subject to double jeopardy because of the weapon enhancement. We decline to address these issues because they could have been raised on the first appeal.

> This court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case.

Davis v. Davis, 16 Wn.2d 607, 609, 134 P.2d 467 (1943). Accord State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) ("Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal"). This is true even for issues of constitutional import. Sauve, 100 Wn.2d at 87. DeRyke retains the remedy of filing a personal restraint petition if he can show grounds for a collateral attack. See Sauve, 100 Wn.2d at 87.

We remand to the trial court to impose the correct community custody

period in the judgment and sentence.

Appelwick, C.J.

WE CONCUR:

Ellington, J. Grosse, J.